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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946.

No.....

MARION M. AMATO, individually and doing business as M. AMATO & SON, PETITIONER.

vs.

PAUL A. PORTER, Administrator, Office of Price Administration, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered October 26, 1946.

JURISDICTION.

The judgment to be reviewed was entered October 26, 1946. Jurisdiction of this Court is invoked under Judicial Code, Section 240(a), 43 Stat. 938, 28 USCA, Sec. 347(a).

SUMMARY STATEMENT.

The Petitioner, an individual, is a wholesale distributor of bananas in Denver, Colorado. The Administrator prosecuted this action against him in the United States District Court for the District of Colorado for treble damages for violation of the Emergency Price Control Act of 1942, as amended. The action was prosecuted on evidence obtained by the Administrator from records which the petitioner was required to keep under the regulations of the Administrator and which were seized by the Administrator under subpoena duces tecum after petitioner gave notice of his claim of privilege against self-incrimination as provided for in the said Act. The District Court over-ruled Petitioner's motions to suppress evidence and to dismiss and entered judgment against Petitioner which decision was affirmed by the Circuit Court of Appeals.

QUESTION PRESENTED.

When Congress includes an immunity provision in a statute empowering the Administrator of the Office of Price Administration to establish record-keeping regulations can the Administrator subject an individual to a penalty based on evidence obtained by subpoena after specific claim of privilege under the statute?

Counsel believes this question to be one of first impression before this Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals for the Tenth Circuit has decided a Federal question (to-wit, an important question of federal constitutional law) which has not been, but should be settled, by this Court and by its opinion has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in that:

1. Claim of privilege and immunity from prosecution, as specifically granted by the statute on which this action by the government is based, is disregarded

by the Circuit Court contrary to the Congressional Act and the Fifth Amendment to the Constitution of the United States.

2. Unless the inclusion of the immunity statute in the Act on which this action is predicated means exactly as its words purport to mean then such does not serve the congressional purpose of making available to the government evidence that otherwise could not be got because of the privilege of silence conferred by the Fifth Amendment prior to the institution of the policy of Congress of incorporating an immunity statute in regulatory acts. Thus, a congressional policy of over 54 years is being thrust aside.

3. The opinion of the Circuit Court of Appeals for the Tenth Circuit extends the application of the "quasi-public record doctrine" beyond its prior application by this Court and creates a precedent and formula on which to wipe out the protection against self-incrimination as guaranteed by the Fifth Amendment.

CONCLUSION.

For these reasons it is respectfully submitted that this petition should be granted.

HAROLD TAFT KING,
720-23 Majestic Building,
Denver, Colorado,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Tenth Circuit (R.33) is not as yet reported. The opinion of the United States District Court for the District of Colorado (R.23) is reported in 60 F. Supp. 361.

II.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals was entered on October 26, 1946. Jurisdiction of this Court is invoked under Judicial Code, Section 240(a), 43 Stat. 938, 28 USCA, Sec. 347(a) as amended by the Act of February 13, 1925.

III.

STATUTES INVOLVED.

The statutes involved are set forth in the appendix, infra, pages 11, 12 and 13.

IV.

STATEMENT.

We adopt the summary statement in the Petition and to give a sufficiently full and clear statement of the case for present purposes add:

The facts are undisputed that Petitioner made claim of privilege at the time the records on which this action is based were first demanded of him (R.22); that he reiterated his claim of privilege when called before the Administrator and produced the records in compliance with subpoena duces tecum (R.10, 11, 12), and at the time he testified under oath concerning the same (R.14, 15, 16, 20, 21); that the Administrator possessed no evidence of violation of the Act by Petitioner and after obtaining Petitioner's records the Administrator filed his complaint for treble damages under the Section 205(e) of the Act (R.1) to which complaint Petitioner interposed a motion to dismiss (R.7) and motion to

suppress evidence (R.8) on the ground the action was taken in contravention of Section 202(g) of the Emergency Price Control Act of 1942, as amended, and the Compulsory Testimony Act of February 11, 1893. The District Court overruled the motions (R.23) on the ground the records are quasi-public in character and Petitioner's answer reiterated his claim immunity (R.28).

The Circuit Court of Appeals for the Tenth Circuit affirmed (R.33) the judgment of the District Court, on the grounds that the records were public records and the action is remedial and not penal in character and the immunity granted by the Fifth Amendment does not apply.

V.

SPECIFICATION OF ERROR.

That the Circuit Court of Appeals erred:

1. In affirming the decision of the United States District Court for the District of Colorado over-ruling Petitioner's motion to dismiss and suppress evidence and holding that Petitioner was not entitled to immunity from prosecution of this action contrary to the provisions of Section 202(g) of the Emergency Price Control Act of 1942, as amended and the Compulsory Testimony Act of February 11, 1893, in violation of Petitioner's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

2. In entering judgment against Petitioner.

VI.

ARGUMENT.

The Congress, to assure the constitutionality of Section 202(b) of the Emergency Price Control Act (vesting the Administrator with the authority to require the keeping of records by those engaged in business and permit inspection by the Administrator) as not violating the Fourth and Fifth Amendments, followed it with the immunity statute. *Counselman v. Hitchcock,* 142 U.S. 547:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution

> after he answers incriminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

And properly, as the penalty imposed by the treble damage section 205(e) of the Act comes within the intendment of the Fifth Amendment, as stated in *Boyd v. United States,* 116 U.S. 616:

> "As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal procedures for all the purposes of the Fourth Amendment to the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

But the Circuit Court of Appeals has held (R.35, 36) that this type of action for the imposition of sanctions is remedial and not penal in nature and the immunity granted by the Fifth Amendment does not come into play. Yet if the privilege does not extend to the present action, incriminating testimony has been elicited from the Petitioner by subpoena after claim of privilege which would enable his conviction in a criminal case based on evidence obtained in this proceeding. If this be so, the protection guaranteed by the Fifth Amendment is an empty shell.

The language of the Act is plain. The Congress, by including the immunity provision (Section 202(g)), with the record-keeping provision (Section 202(b)) of the Act intended that immunity should be granted to the individual specifically claiming it in order to constitutionally make available to the Administrator the information he sees fit to require in administering or enforcing the provisions of the Act.

2.

The "Public Records Doctrine" as first enunciated by this Court in *Wilson v. United States*, 221 U.S. 361, 380, supports the statutory authority granted the Administrator to require the keeping of records by one engaged in business and the right of an enforcement agency of the government to seize such records, by subpoena if the need requires—but the decision of the Circuit Court of Appeals extends this doctrine (R.34, 35) to include the prosecution of a criminal action or one for a penalty based on such records despite claim of privilege having been interposed by an individual prior to the Administrator receiving such records. Thus the decision of the Circuit Court of Appeals overcomes the constitutional grant of immunity in the Fifth Amendment as reiterated by Congress in the very act (Sec. 202 (g)) under which this action is brought. We feel the "public record" cases bear solely on the question of search and seizures. That is, they are precedent for the right of the Administrator to obtain these records. Having obtained them—in the face of a claim of privilege—he cannot prosecute a criminal action or one for a penalty based on such records. The Administrator had the option to reject the evidence and deny the immunity or to receive it and thereby grant the immunity.

The decision of the Circuit Court is also based on the ground that the liability imposed by Section 205 (e) of the Emergency Price Control Act is not a criminal penalty or forfeiture but is a civil and remedial sanction. We reply that the constitutional privilege against self incrimination is not dependent upon the nature of the proceeding but on its purpose. There can be no question but that it was the intention of the Congress, in passing this Act providing for treble damages and giving the right of action to the government to collect it, to exact a penalty as punishment for violation of regulations issued pursuant to the Act. Otherwise it would be necessary to argue that immediately upon the occurrence of a violation of a law the offender owes the government a particular sum of money and that the action to recover is merely a remedial civil action.

Here, as Mr. Justice Brandeis stated in *McCarthy v. Arndstein*, 266 U.S. 34, 40:

> "The government insists, broadly, the constitutional privilege against self incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it."

This action was not brought for the purpose of enriching the government or reimbursing the government for a loss sustained by it—its sole purpose is punishment of the petitioner for violation of the Act. As was said in *United States v. LaFranca*, 282 U.S. 568, 573:

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

If this action was the use of the injunctive process by the Administrator or an action by a consumer against a retailer for reimbursement and additional damages account an overcharge, such would be examples of remedial civil actions—the injunction to protect against future violations and the other to compensate for a past wrong committed against the party seeking to be reimbursed. Neither example fits this case—here the Administrator chose to punish violation of the law by subjecting petitioner to a penalty (of a quasi-criminal nature, according to the *Boyd* case) instead of punishing by a criminal prosecution.

The Compulsory Testimony Act of February 11, 1893 (USC 1934 Ed., Title 49, Sec. 46) has been incorporated continuously in legislative acts since that time—in 17 federal regulatory acts passed in the 10-year period of 1933 to 1943 (according to detail of its history in the *United States v. Monia*, 317 U.S. 424) and its importance in enabling the gov-

ernment to obtain needed information has been so well understood that no attempt to narrow its application or destroy its purpose has been made until now. We sincerely feel that the Circuit Court overlooked the fact that unless this statute means just exactly as its words purport to mean then it does not serve its purpose of making available to the government evidence that otherwise could not be got because of the privilege of silence conferred by the Fifth Amendment prior to enactment of this Act. A congressional policy of over 54 years is in danger of being thrust aside.

We respectfully submit that a reversal of the decisions entered below will not hinder the full and legal enforcement of law; all government enforcement is subject to the same constitutional limitations as have been in effect since the Bill of Rights was added to our Constitution. As stated by Mr. Justice Murphy in *United States v. White*, 322 U.S. 694, 698, 64 S. Ct. 1248, 1251:

> "The prosecutors are forced to search for independent evidence instead of relying upon truth extracted from individuals by force of law. The immediate and potential evil of compulsory, self-disclosure transcends any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels. . . ."

Since the Administrator in this case has gone beyond the clear limitation imposed by Congress, namely, imposed an action for a penalty based entirely on records produced under the dictate of Congress after a specific claim of privilege against self-incrimination, his action should fail.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that an important question of federal law can be settled by this Court and that to such an end a writ of certiorari should be granted and this Court review the decision of the Circuit Court of Appeals for the Tenth Circuit.

HAROLD TAFT KING,
Denver, Colorado,
Attorney for Petitioner.

APPENDIX.

The Emergency Price Control Act

(56 Stat. 30, 58 Stat. 637)

(50 U.S.C.A., Appendix 922)

Sec. 202

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of such records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4(a).

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U.S.C., 1934 edition, title 49, sec. 46) shall apply with respect to any individual who specifically claims such privilege.

Section 205

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater:

(1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, that such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this sanction the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the

buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in an other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

Compulsory Testimony Act.
(49 U.S.C.A. 47)

§47. Immunity of witness from prosecution; perjury. No person shall be prosecuted or be subject to any penalty for forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under the preceding chapter or any law amendatory thereof or supplemental thereto: *Provided,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. (Feb. 25, 1903, c. 755, § 1, 32 Stat. 904.)